

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARBARA KUNEY)	
Claimant)	
)	
VS.)	
)	
ROSSVILLE HEALTHCARE & REHABILITATION CENTER, LLC)	
Respondent)	Docket No. 1,041,449
)	
AND)	
)	
UNITED WISCONSIN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 7, 2009 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 6, 2010.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Michelle Daum Haskins of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed Barbara Kuney suffered injury to her left knee as a result of a slip and fall accident at work for respondent. The parties were unable to agree upon the nature and extent of her disability. The Administrative Law Judge (ALJ) adopted the rating of the court ordered independent medical examiner, Dr. Peter V. Bieri, and awarded Kuney permanent partial disability compensation for a 7 percent K.S.A. 44-510d scheduled disability to the left lower extremity.

Kuney requests review of the nature and extent of disability. She argues that her medical expert performed a more exhaustive physical examination than either the court ordered physician or the respondent's medical expert. Consequently, she further argues the Board should adopt her medical expert's 27 percent functional impairment to the left lower extremity. Conversely, the respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of Kuney's K.S.A. 44-510d scheduled disability to the left lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On May 31, 2007, Kuney was assisting a resident when she slipped on some urine and fell to the floor. When she fell to the floor, she fell down on both knees. After she fell, she felt pain in both knees, but her left knee hurt more than her right. She was unable to get up on her own due to pain. Another worker, who was in the room at the time, helped her up.

Kuney told the nurse what had happened and was referred to St. Mary's Health Clinic for medical treatment. She continued to get treatment at St. Mary's Health Clinic, but after an MRI was performed, she was sent to Dr. Richard E. Polly. Claimant first saw Dr. Polly on August 7, 2007. By the time she started seeing Dr. Polly, her right knee pain had resolved, but she was continuing to have problems with her left knee. She complained of constant pain, swelling and she could hardly walk on her left knee.

Kuney testified that Dr. Polly x-rayed her left knee and said that there had been some damage done under the kneecap. He recommended surgery on her left knee. She had the arthroscopic surgery, which was performed by Dr. Polly on December 7, 2007. The surgery eased some of the pain, but it did not eliminate all of Kuney's left knee pain.

On May 13, 2008, Kuney saw Dr. John H. Gilbert at the request of respondent for the purpose of providing a rating. Dr. Gilbert is a board certified orthopedic surgeon and a board certified independent medical examiner. Dr. Gilbert performed a physical examination on Kuney. Dr. Gilbert stated that the physical examination doesn't usually take a great deal of time; probably between 5 and 10 minutes. Dr. Gilbert watched her walk, had her squat, put her on the table, palpated the knee during a range of motion, and tested ligaments. He also tested for cartilage derangements as well as sensation in the lower extremity. He specifically examined Kuney for ligament instability. He testified that was done by applying varus and valgus stress to the knee, with the knee first in extension and then in slight flexion and then anteroposterior stress to the knee, usually at slight flexion. He found no ligament laxity.

Dr. Gilbert took x-rays of Kuney's knee in the course of his examination and he used those x-rays in determining impairment. Dr. Gilbert concluded that Kuney had chondromalacia of the left patella and medial femoral condyle, status post arthroscopy and debridement. Dr. Gilbert opined that as a result of the May 31, 2007, injury, Kuney suffered a 5 percent permanent partial impairment of the left lower extremity based upon the *AMA Guides*, Fourth Edition. Dr. Gilbert used Table 62 on page 83 of the *Guides*. Kuney had a change in cartilage interval from 4 mm to 3 mm, so he concluded that she fit within a 5 percent lower extremity impairment but a footnote to that section of the *Guides* indicates that 5 percent is for patients without joint narrowing. Finally, Dr. Gilbert restricted Kuney from climbing.

Dr. Lynn A. Curtis, board certified in physical medicine and rehabilitation and spinal cord injury, saw Kuney on August 20, 2008, at the request of Kuney's attorney. At that time, Dr. Curtis took a history from Kuney and performed a physical examination. Dr. Curtis agreed the only medical record he reviewed was Dr. Gilbert's rating report and that he did not take any x-rays of Kuney's knee. Dr. Curtis noted that when he examined Kuney she was not taking any type of anti-inflammatory or pain reliever, stated her knee hurt some and she denied any weakness in her left knee.

Dr. Curtis opined Kuney was at MMI at the time of the evaluation. Dr. Curtis's ultimate diagnosis was that Kuney "had a slip and fall injury at work with a knee injury, the right knee which resolved, and she had left knee injury that required arthroscopy. This resulted in aggravation of patellofemoral joint disease. She also had a patellar contusion, residual medial joint laxity and a chronic limp."¹

Dr. Curtis rendered his opinion as to Kuney's permanent partial impairment based on the Fourth Edition of the *AMA Guides*. Dr. Curtis provided a rating of 5 percent to the left lower extremity, taken from table 62, page 83, for patellar contusion; a rating of 17 percent to the left lower extremity taken from table 64, page 85, for posttraumatic medial laxity; and a rating of 7 percent to the left lower extremity taken from table 62, for aggravation of patellofemoral joint disease. Dr. Curtis combined the ratings for a 27 percent permanent partial functional impairment to the left lower extremity. Dr. Curtis imposed restrictions that Kuney should do no climbing or jumping, and should not walk at unprotected heights.

Because of the disparity between the ratings provided by Drs. Curtis and Gilbert, the ALJ entered an Order for Dr. Peter V. Bieri to perform an independent medical examination of Kuney. Dr. Bieri is a fellow of the American Academy of Disability Evaluating Physicians. Kuney saw Dr. Bieri on January 29, 2009.

¹ Curtis Depo. at 5.

Dr. Bieri reviewed Kuney's medical records which he noted exceeded 150 pages and he also reviewed x-ray films of both knees. Dr. Bieri noted Kuney complained of left knee pain and difficulty with squatting, kneeling, climbing and descending stairs. Dr. Bieri performed a physical examination of Kuney's left knee. His examination of the left knee indicated no sign of swelling or joint effusion. No atrophy was noted in either the thigh or calf. Strength was normal and there was no instability against manual testing against resistance. He found Kuney to be at MMI. Dr. Bieri rated Kuney with a 7 percent impairment of the left upper extremity for patellofemoral pain and narrowing of the joint space. This rating was based upon the *AMA Guides*, Fourth Edition, Table 62, page 83. Finally, Dr. Bieri noted that it would be appropriate for Kuney to limit climbing and descending stairs and ladders.

Kuney testified that she continues to have pain and swelling in her left knee. She takes Tylenol but it does not alleviate her knee pain. She further testified that there are days when she wears a knee brace due to her knee pain. But neither Dr. Bieri, Dr. Gilbert nor Dr. Curtis detected any swelling in Kuney's knee upon examination and no mention was made of her use of a knee brace.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The evidentiary record contains ratings provided by Drs. Curtis, Gilbert and Bieri. All three doctors ratings were based upon the Guides. Dr. Curtis rated Kuney's left lower extremity at 27 percent; Dr. Gilbert rated Kuney's left lower extremity at 5 percent; and the court ordered independent medical examiner, Dr. Bieri, rated Kuney's left lower extremity at 7 percent.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.²

Kuney argues that the Board should adopt the rating provided by Dr. Curtis as he performed the most exhaustive physical examination. The difficulty with this argument is that time spent conducting the examination does not necessarily equate to the most

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

persuasive rating. Initially, it should be noted that Dr. Curtis did not review all of Kuney's medical records so he did not have a complete history of her complaints and treatment. Nor did he have x-rays to review. Consequently, the time spent conducting the examination is merely a factor to consider when weighing the evidence but is not absolutely controlling.

Dr. Gilbert agreed that he only spent 10 to 15 minutes with Kuney conducting his physical examination but noted that is all the time it typically takes to perform the necessary testing. But Dr. Gilbert rated based upon a section of the Guides that indicated it was only appropriate if there was no joint narrowing. And Dr. Gilbert had detected joint narrowing in Kuney's knee.

Both Drs. Gilbert and Bieri specifically noted no instability in Kuney's knee. Dr. Bieri reviewed all the extensive medical records, reviewed the x-rays and conducted a physical examination which included testing Kuney's knee. Dr. Bieri then rated appropriately based upon his findings and pursuant to the Guides. Based upon a review of the entire evidentiary record, the Board finds Dr. Bieri's rating more persuasive and affirms the ALJ's Award.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 7, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge